RAMANATHAN CHELLIAH

v.

PENYUNTING, THE MALAY MAIL & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
RK NATHAN J
[CIVIL SUIT NO: S2-23-26-1994]
9 FEBRUARY 1998

TORT: *Defamation - Libel in newspaper - Report of conviction - Plaintiff's appeal against conviction still pending - Whether defendants entitled to rely on conviction to prove justification and fair comment*

TORT: *Defamation - Fair comment - Whether defendants allowed to adduce evidence of plaintiff's conviction - Whether common law rule applicable*

EVIDENCE: *Criminal conviction - Whether admissible in civil proceedings - Rule in Hollington v. Hewthorn - Whether to be followed - Whether still good law today - Decisions of English courts - Whether binding on Malaysian courts - Weight*

The plaintiff sought damages for libel and an injunction to restrain further printing and/or publishing of the said or similar libellous words and costs. In the course of the trial, counsel for the defendants wanted to tender evidence of the plaintiff's conviction for an offence under s. 354 of the Penal Code relying on a defence of justification and fair comment. The plaintiff had been charged and found guilty and was convicted and sentenced to imprisonment. The plaintiff's appeal against the conviction was pending. By consent, both parties agreed to stay the proceedings of the trial proper and to obtain a ruling as to whether or not the conviction of the plaintiff for an offence under s. 354 of the Penal Code was admissible evidence to support the plea of justification and fair comment.

Held:

[1] The Evidence Act 1950 does not deal with the operative function of a previous conviction in relation to a subsequent civil proceeding in respect of the matter relating to or arising from the earlier criminal conviction. It would seem that the court has therefore to adopt the common law approach.

[2] The rule in *Hollington v. Hewthorn* means that if anyone publishes a story about a crime, he is in peril of being sued for libel and in the course of defending that action he cannot rely on the conviction as proof of guilt. He has to prove it all over again. However, the instant court was of the view that a conviction is *prima facie* evidence of guilt. If the plaintiff wished to rebut it he was entitled to do so by giving evidence. But the defendant when raising the defence of justification or fair comment was clearly entitled to rely on the conviction.

[3] Whilst in the instant case the plaintiff had not exhausted all his appeals, the court held that for the purposes of raising a defence of justification and fair comment, the defendants were entitled to raise the issue of the plaintiff's conviction for the offence under s. 354 of the Penal Code. The defendants ought not to be put to the ordeal of having to prove the plaintiff's conviction all over again.

[4] Further, since the claim was for libel, the character of the plaintiff was vital to the question of damages. The defendants must be given the liberty to plead all relevant facts that would be relevant towards mitigating damages. The court held that the conviction of the plaintiff for an offence under s. 354 of the Penal Code was admissible evidence of the fact that the plaintiff had been found guilty of that offence.

[Prior conviction admissible.]

Cases referred to:

A Dickinson v. Public Prosecutor [1955] 21 MLJ 191 ***(refd)***
Barclays Bank Ltd v. Cole [1967] 2 QB 738 ***(refd)***
Chow Kay Kong v. Ching Tong & Ors [1967] 2 MLJ 31 FC ***(refd)***
Fan Yew Teng v. Setia Usaha, Dewan Ra'ayat & Ors [1975] 2 MLJ 40 ***(cit)***
Goody v. Odhams Press Ltd [1967] 1 QB 333 ***(foll)***
Hollington v. F Hewthorn & Co Ltd [1943] 2 All ER 35 ***(not foll)***
Jamil Harun v. Yang Kamsiah & Anor [1984] 1 MLJ 217 ***(refd)***
Jorgensen v. News Media (Auckland) Ltd [1969] NZLR 961 ***(foll)***
Ong Tua Chor v. Lee Beng Tong [1976] 1 MLJ 187 ***(refd)***
Raja Mokhtar Raja Yaacob v. Public Trustee, Malaysia [1970] 2 MLJ 151 ***(refd)***

Legislation referred to:

Penal Code, s. 354
Road Traffic Ordinance 1958, s. 30(1)
Civil Evidence Act 1968 [UK], s. 13(1)

Other source referred to:

Practical Approach to Assessment of Liability and Damages in Tort, RK Nathan, p 117

Reported by Anne Khoo

JUDGMENT

RK Nathan J:

Facts

The plaintiff was at all material times a Malaysian National Athletics Coach. The 1st defendant is the editor of the Malay Mail and the 2nd defendant is the proprietor, printer and publisher of the Malay Mail which said newspaper has a wide circulation throughout Malaysia.

The plaintiff's case against the defendants is for damages, for libel and for an injunction to restrain further printing and or publishing of the said or similar libellous words and for costs.

The alleged defamation related to the defendants' publication in the Malay Mail of the following:

ATHLETE LODGES REPORT

'Coach fondled breasts under pretext of massage'

and

'A junior woman athlete yesterday lodged a police report alleging that she had been sexually harassed by national athletics coach C. Ramanathan'

The trial proceeded with witnesses having been called.

The Plaintiff's Conviction

In the course of the trial learned counsel for the defendants wanted to tender evidence of the plaintiff's conviction for an offence under s. 354 of the Penal Code.

Section 354 of the Penal Code reads:

> Whoever assaults or uses criminal force to any person, intending to outrage or knowing it to be likely that he will thereby outrage the modesty of that person, shall be punished with imprisonment for a term which may extend to ten years, or with fine, or with whipping, or with any two of such punishments.

His reason for so doing was because the defence was that of justification and fair comment. The defendants had pleaded particulars of justification and had stated that they relied on a police report lodged by one Rasidah bte Othman on 7 March 1994.

There is no doubt that the plaintiff was indeed charged under the said offence and found guilty and convicted and sentenced to imprisonment. He has since appealed against the said decision. The appeal has not as yet been heard. This charge was in respect of the police report made by Rasidah bte Othman and the subject matter of which had formed the basis for this libel suit.

By consent both parties agreed that I make a ruling whether the conviction of the plaintiff for an offence under s. 354 of the Penal Code at the Sessions Court at Kuala Lumpur is admissible evidence to support the plea of justification and fair comment. The trial proper was therefore stayed and I heard submissions on this issue.

Court's Finding

It is unfortunate that neither party thought it proper to delve into the facts of the case which led to the plaintiff's conviction in the lower court. I have not been shown whether the plaintiff pleaded guilty to the charge or charges or was found guilty after a trial. I have not been told the facts nor the evidence nor shown the notes of evidence of the trial. All I have been asked to do is to decide whether the fact of conviction of the plaintiff for an offence under s. 354 of the Penal Code is admissible evidence to support the plea of justification and fair comment. In my book *"Practical Approach to Assessment of Liability and Damages in Tort"*, RK Nathan, at p. 117, I had held the view that where a co-defendant to a civil proceeding who did not enter appearance to the said proceeding pleads guilty to a charge of careless driving in the Magistrate's Court and where at the trial of the civil proceeding the trial judge admits the notes of proceedings in the Magistrate's Court where the co-defendant had pleaded guilty, the co-defendant's plea of guilt can be taken into account and he will be precluded from raising a case of contributory negligence because he had had every opportunity to explain his previous unqualified admission of liability and he did not seek to lay the blame or part of the blame elsewhere by failing to even enter appearance let alone to defend the action. I was also of the view that a plea of guilt to the charge of inconsiderate driving is an admissible admission. I also held the view that where a defendant had pleaded guilty to a traffic offence and had been fined and with regard to the same accident relating to a claim for damages, he proffers an explanation giving the circumstances under which he pleaded guilty in the traffic court, and asserts that he was never careless, the court is at liberty to evaluate the facts and to accept the explanation if reasonable and I further stated that a plea of guilt of inconsiderate driving before a magistrate is not necessarily conclusive evidence of negligence in the subsequent claim for

damages. It is an admissible admission which will support the opponent's case and which will weigh against the party who pleaded guilty. However it must be noted that in *Hollington v. F. Hewthorn & Co Ltd* [1943] 2 All ER 35 the Court of Appeal held that a certificate of conviction cannot be tendered in evidence in civil proceedings. On a subsequent civil trial the court should come to a decision on the facts before it without regard to the proceedings before another tribunal.

It is noteworthy that in Malaysia the Evidence Act does not deal with the operative function of a previous conviction in relation to a subsequent civil proceeding in respect of the matters relating to or arising from the earlier criminal conviction. It would seem that the court had therefore to adopt the common law approach.

In *Ong Tua Chor v. Lee Beng Tong* [1976] 1 MLJ 187 Ajaib Singh J said at p. 189:

> With regard to the submission that the record of the conviction against the appellant was inadmissible I agree that a conviction obtained against a person in criminal proceedings is inadmissible in evidence in civil proceedings but a plea of guilty being an admission is certainly admissible if it is relevant to the matter in issue as was the case in the present appeal.

Mr. Karpal Singh relied heavily on *Hollington v. Hewthorn*. He argued that this principle, although of common law origin, has been taken for granted as being applicable in Malaysia because it is entrenched upon the basis of presumption of innocence. He argued that since the plaintiff's appeal against his conviction has not been heard by the High Court and that since the plaintiff had not exhausted his ultimate rights of appeal, it is wrong to rely on the conviction. Whilst he accepted the fact of conviction in the Sessions Court he was not prepared to accept the conviction as a finality. It was his view that even where a plaintiff did not appeal, his conviction ought not to be admissible as the plaintiff could have failed to appeal for many reasons including lack of funds. He relied on *Fan Yew Teng v. Setia Usaha, Dewan Ra'ayat & Ors* [1975] 2 MLJ 40 where Mohamed Azmi J (as he then was) held that the plaintiff's seat did not become vacant automatically merely because he had been convicted by the High Court and fined RM2,000 and had not received a free pardon. His Lordship held that the plaintiff was entitled to exhaust his legal rights just as the House of Representatives was entitled to decide as to his disqualification at any time it deemed fit once the question of his disqualification was raised, although in what circumstances it was raised were not at all relevant. He urged upon me to be bound by the principle enunciated in *Hollington v. Hewthorn* unless it is remedied by statute as has

since happened in the United Kingdom where by virtue of s. 13(1) of the Civil Evidence Act 1968 the common law position no longer prevails and that proof that the plaintiff stands convicted of the offence is conclusive proof that he did commit it.

On this issue of whether I ought to follow the decision of *Hollington v. Hewthorn* Encik Pawancheek for the defendants argued that the rule in *Hollington v. Hewthorn* should not be followed.

It is imperative therefore for me to consider fully the case of *Hollington v. Hewthorn.*

The plaintiff in that case, due to the death of his son, was unable to adduce any direct evidence of the circumstances of the accident and was therefore obliged to rely on the conviction of the 2nd defendant, Poll, for careless driving at the time and place of the accident. The trial judge ruled that the evidence which was tendered as to the conviction of the 2nd defendant for careless driving was not admissible as being *res inter alios acta.* However, on a submission of "no case" by the defendants, who called no evidence, the trial judge ruled that the plaintiff had established a *prima facie* case of negligence and gave judgment in his favour. The defendants appealed. The Court of Appeal was unanimously of the opinion that both on principle and authority the evidence of the conviction of the plaintiff was inadmissible for the purpose for which it was tendered.

The Court of Appeal was of the view that the conviction was only proof that another court considered that the 2nd defendant was guilty of careless driving and just as the opinion of a bystander who had a full view of an accident is not relevant, similarly on the trial of the issue in the Civil Court the opinion of the Criminal Court is equally irrelevant. The Court of Appeal also held the view that the introduction of the evidence of conviction of a party in the civil case of a criminal offence did not fall under any of the recognised exceptions to the best evidence rule. Further if a conviction is admissible then equally an acquittal should be admissible as evidence and if this was to be the rule then the court trying the civil action can get no real guidance from the former proceedings without in fact actually retrying the criminal case.

The Voices Of Dissent

Even before statute intervened to put an end to the rule in *Hollington v. Hewthorn* voices of dissent and rumblings of discontent were beginning to be heard against the rule in *Hollington v. Hewthorn.* Counsel arguing for the plaintiff in *Hollington v. Hewthorn* was none other than Mr. Denning KC (as his Lordship then was). However when he sat in the Court of Appeal in *Goody*

v. Odhams Press Ltd [1967] 1 QB 333 Lord Denning MR voiced *per incuriam* the view that the principle of *Hollington v. Hewthorn* although binding upon him should be reconsidered. In *Goody's* case the plaintiff sued the defendant for libel contained in a newspaper article. The plaintiff was described by the defendant as one of the persons who had taken part in The Great Train Robbery for which he had been convicted of conspiring to stop a mail train, being armed at the material time with an offensive weapon, and with robbery of 120 mail bags. The trial resulted in the plaintiff being found guilty and receiving a sentence of 30 years imprisonment. The defendants pleaded full justification saying that the words complained of were true in substance and in fact. However, because of the rule in *Hollington v. Hewthorn*, that a conviction is no evidence of guilt, the defendants amended their defence to plead the partial justification that in so far as the words complained of alleged that the plaintiff was in prison for 30 years and his appeal disposed of, they were true in substance and in fact.

Lord Denning, the crusader, made the first dent in the rule in *Hollington v. Hewthorn* when he held that the words of the plea of partial justification in the amended defence, being severable from the rest of the article, were admissible, and under it the defendants could prove the plaintiff's conviction and sentence. He also held that previous convictions within a relevant period of the plaintiff's life being cogent evidence that he had a bad reputation, were admissible in evidence in mitigation of damages.

I cannot but agree with the views expressed by the then Master of the Rolls. The strange rule in *Hollington v. Hewthorn* means that if anyone publishes a story about a crime, he is in peril of being sued for libel and in the course of defending that action he cannot rely on the conviction as proof of guilt. He has to prove it all over again. I hold the view that such a conviction is *prima facie* evidence of guilt. If the plaintiff wishes to rebut it he is entitled to do so by giving evidence. But the defendant when raising the defence of justification or fair comment is clearly entitled to rely on the conviction.

Another case which pierced the dent caused by *Goody's* case was *Barclays Bank Ltd v. Cole* [1967] 2 QB 738. The plaintiff bank was robbed of £52,250. Two days later the defendant paid £6,200 into another branch of the plaintiff where he had an account. This sum of £6,200 was part of the proceeds of the robbery. He was indicted with the robbery. He was ready to plead guilty to receiving the £6,200, knowing it to have been stolen but he denied the robbery. He denied taking part in the raid. The prosecutors proceeded with the charge of robbery. The jury disagreed. He was tried again before another jury which found him guilty and he was sentenced to 15 years imprisonment. His appeal to the Court of Criminal Appeal was rejected. The plaintiff found

that the defendant had £16,076 6s. 5d. to his credit in their books. £6,200 was the proceeds of the robbery. The remaining £10,000 came from elsewhere. The plaintiff brought an action against the defendant for the £52,250 being monies had and received. The plaintiff pleaded facts leading to the robbery. The defendant denied each and every allegation in the statement of claim. It was again Lord Denning MR who heard the appeal. As a result of *Hollington v. Hewthorn* he said at p. 743 that:

> ... In order to be able to bring this civil action Barclays Bank had first to make sure that Cole was prosecuted in the criminal court: see *Smith v. Selwyn* ([1914] 3 KB 98, CA). Now after seeing him duly prosecuted and convicted, they are asked to prove his guilt all over again in this civil suit.

The New Zealand View

In 1969 New Zealand's highest court, the Court of Appeal strongly criticised the decision in *Hollington v. Hewthorn* and refused to follow it. In *Jorgensen v. News Media (Auckland) Ltd* [1969] NZLR 961 the plaintiff claimed NZD2,000 damages for libel in respect of a statement published by the defendant on 9 July 1967 in its newspaper the Sunday News (Northern Edition). After the jury disagreed on the first trial a case was stated asking "... whether ... the conviction of the plaintiff on 4 March 1964 for the murder of one Kevin James Speight on 5 December 1963 is admissible evidence in this action of the guilt of the said plaintiff and whether the said conviction is conclusive of such guilt and whether proof by the defendant of such conviction discharges the onus of proof of the guilt of the plaintiff of such murder ...". The court held that a certificate of Jorgensen's conviction is not merely conclusive evidence of the fact that Jorgensen had been found guilty of the murder of Speight but also is admissible evidence, while not conclusive, of the fact of guilt of the crime charged against Jorgensen at the time and place named in the indictment. Whether such evidence discharges the evidentiary burden of proof at any stage is for the trial court to decide on the whole of the evidence tendered at that stage.

Mr. Karpal Singh referred me to *Chow Kay Kong v. Ching Tong & Ors* [1967] 2 MLJ 31 FC wherein *Hollington v. Hewthorn* was referred to and in such circumstances Mr. Karpal Singh submitted that I am bound by the decision of the then Federal Court. It is therefore important for me to scrutinise Chow Kay Kong. The facts were thus: A motor-car in which the plaintiff was a passenger collided with an oncoming lorry and as a result the plaintiff was seriously injured. He sued the driver of the car and the owners of the lorry, respectively being the 1st and 2nd defendants. The negligence alleged against one or the other or both of them was in identical terms. The 1st defendant

entered no appearance. The 2nd defendants denied all negligence on the part of their servant and alleged all negligence against the 1st defendant. The plaintiff and the 2nd defendants were the only parties heard at the trial. At the trial there was conflicting evidence. The learned trial judge admitted in evidence the notes of proceedings in the Magistrate's Court where the 1st defendant had pleaded guilty to a charge of careless and inconsiderate driving under s. 30(1) of the Road Traffic Ordinance and held the absent 1st defendant solely responsible. In this appeal the plaintiff sought to make the 2nd defendants liable for contributory negligence. The main question raised in the appeal was whether the learned trial judge was right to treat the 1st defendant's plea of guilt to the charge preferred against him as an admission of such a nature as to preclude the court from entertaining a case of contributory negligence against the other defendants. The then Federal Court held that as the 1st defendant had had every opportunity to explain his previous unqualified admission of liability and did not seek to lay the blame or part of the blame elsewhere, the trial judge was right in taking into account the 1st defendant's plea of guilt and precluding a case of contributory negligence against the other defendants. Further, where the evidence on both sides was so evenly balanced that the judge had to look for evidence elsewhere to decide the issue, it was abundantly clear that the appellant had failed to discharge the onus of proof which rested on him as plaintiff.

The only part of the judgment where reference was made to *Hollington v. Hewthorn* was at p. 32 where Ong Hock Thye FJ said:

> ... The first defendant had had every opportunity to explain his previous unqualified admission of liability. He did not seek to lay the blame, or a part of it elsewhere. The judge, in my opinion, quite rightly took this fact into account: see *Hollington v. F. Hewthorn* ([1943] KB 27) and *Ingram v. Ingram* ([1956] 2 WLR 782).

Firstly to my mind, the judgment does not state in what manner the principle in *Hollington v. Hewthorn* was applicable in *Chow Kay Kong.* On the contrary, if the rule in *Hollington v. Hewthorn* was to be applied the plea of guilt of the 1st defendant ought not to have been admitted into evidence. But in *Chow Kay Kong,* the learned trial judge did admit it into evidence. It is obvious that the then Federal Court even as early as in 1967 had decided to question the sanctity of the rule in *Hollington v. Hewthorn.*

It is my view that the law cannot be static. It must fine-tune itself with the dictates of time. Deadwood must be trimmed. Obsolete decisions must give way to right-thinking views. Even the very Court of Appeal that decided the rule in *Hollington v. Hewthorn* felt the need for its change. As to whether I

am, as suggested by Mr. Karpal Singh, bound by the decision of the English Court of Appeal I need to only refer to *A. Dickinson v. Public Prosecutor* [1955] 21 MLJ 191 where Bellamy J said at p. 193:

> I think there can be no doubt that, with the exception of decisions of the Judicial Committee of the Privy Council and, in some case, of the House of Lords, decisions of the English Courts are not binding on this court. However, this court is always prepared to treat such authorities with deference and, where they can be held to apply, will follow them. Before accepting them, of course, the court must be satisfied that they deal with the same problem as that which it is called upon to solve in the case in which these authorities are cited to it.

In *Jamil bin Harun v. Yang Kamsiah & Anor* [1984] 1 MLJ 217 Lord Scarman said at p. 219:

> Their Lordships do not doubt that it is for the courts of Malaysia to decide, subject always to the statute law of the Federation, whether to follow English case law. Modern English authorities may be persuasive, but are not binding. In determining whether to accept their guidance the courts will have regard to the circumstances of the states of Malaysia and will be careful to apply them only to the extent that the written law permits and no further than in their view it is just to do so.

In other words, our courts need not be bound by the decision of the House of Lords. However, it is patently clear that the Malaysian courts are always willing to draw upon basic common law principles and to consider decisions of the Commonwealth for guidance. In *Raja Mokhtar bin Raja Yaacob v. Public Trustee, Malaysia* [1970] 2 MLJ 151 Raja Azlan Shah J (as His Highness then was) said at p. 152:

> Although decisions of Commonwealth courts are not binding, they are entitled to the highest respect. In my view it is important that I should apply the principles formulated in *Parry v. Cleaver* and *Jones v. Gleeson* so that the common law and its development should be homogeneous in the various sections of the Commonwealth: per Lord Parker CJ in *Smith v. Leech Brain & Co Ltd* [1962] 2 QB 415.

Whilst I agree that in this case the plaintiff has not exhausted all his appeals I still hold that for the purposes of raising a defence of justification and fair comment, the defendants are entitled to raise the issue of the plaintiff's conviction for the offence under s. 354 of the Penal Code in the Sessions Court at Kuala Lumpur. It is for the plaintiff to explain if he wants to, why he pleaded guilty or if he was found guilty, whether he has any other reasons which he had not narrated at the earlier trial. Needless to say any deviation

of his evidence from what has already been recorded at the Sessions Court during the trial of the criminal case can be used against him in his trial in the civil proceedings. Subject to that he can explain to the court. The defendants ought not to be put to the ordeal of having to prove the plaintiff's conviction all over again. This is waste of judicial time and litigant's money. Further, since the claim is for libel the character of the plaintiff is very vital to the question of damages. The defendants must be given the liberty to plead all relevant facts that would be relevant towards mitigating damages. My ruling is that the conviction of the plaintiff for an offence under s. 354 of the Penal Code at the Sessions Court at Kuala Lumpur is admissible evidence of the fact that the plaintiff had been found guilty of that offence.

Needless to say, whether such evidence discharges the evidentiary burden of proof at any stage is for the trial court to decide on the whole of the evidence tendered at that stage.

Costs to follow the event.